there were the Attorney-General was debarred from asserting it in that, *inter alia*, the existence of the trust could and should have been asserted in the previous litigation against the council. The Full Court of the Supreme Court dismissed the appeal.

The defence of *res judicata* was considered and disposed of at page 425, and we cite:–

"The second defence is one of *"res judicata"*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which we could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V.C. in *Henderson* v. *Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.* [1975] A.C. 581. It was, in the judgment of the Board, there described in these words:

"... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." (p. 590).

This reference to "abuse of process" had previously been made in *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255 per Somervell L.J. and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut from bringing forward a genuine subject of litigation.

In their Lordships' opinion there is no room for application of this doctrine here."

We are satisfied that in this appeal, likewise *res judicata* should not be applied because the cause of action and the issues are different.

We would allow the appeal with costs.

Appeal allowed.

Solicitors: *Vohrah & Tan Chee Lan; Sethu, Ghazali & Gomez.*

WONG KUAN TAN v. GAMBUT DEVELOPMENT SDN. BHD.

[F.C. (Wan Suleiman, Abdul Hamid & Hashim Yeop A. Sani F.JJ.) May 24, 1983 & April 30, 1984]

[Kuala Lumpur – Federal Court Civil Appeal Co. 153 of 1983

Land Law – Caveat – Interest in land capable of protection by caveat – Claim of payment of unpaid balance of purchase price – Alleged trust over odd lots not included in sale – National Land Code, s.323(1)

In this case the appellant had sold his land and transferred it to the respondent. He claimed that part of the purchase price had not been paid and that there was a trust over odd lots not included in the transfer. The appellant filed a caveat against the land and the respondent applied for removal of the caveat. The learned trial judge ordered the caveat to be removed. The appellant appealed.

Held: (1) there was no reason to disagree with the finding of the learned judge that the whole of the land was sold absolutely and that there were no odd lots unsold;

(2) the appellant therefore had no interest in the land capable of protection by a caveat. Neither has the appellant satisfied the court on the allegation of trust. Therefore the appellant had no right to lodge the caveat in the first place and much less right to have the caveat extended.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

(2) *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.* [1976] 2 M.L.J. 44.

FEDERAL COURT.

S. Balendran for the appellant.

Mrs. De Silva for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The application before the learned Judge was under section 327(1) of the National Land Code, 1965 for the removal of a private caveat (Presentation No. 165/78, Jilid 2, Folio 99) presented by the respondent (appellant now) in respect of land held under C.T. No. 4876 Lot No.3 Section 20, Town of Kuantan.

The grounds for the removal of the caveat as set out in the application were –

(1) The respondent had no interest in the said land;

(2) The respondent did not have any right to claim title to or any caveatable interest in the land; and

(3) The said private caveat was wrongly presented by the respondent.

It can be seen that all these grounds form substantially only one ground i.e. the appellant had no interest as envisaged under section 323(1) of the National Land Code which interest may be protected by a caveat.

A number of affidavits were filed by both parties and one witness was called on behalf of the applicant and two witnesses on behalf of the respondent. At the conclusion of the hearing the learned Judge ordered the said caveat to be removed. The appeal is against that order.

Some background facts are necessary and they may be summarised as follows. On December 28, 1977 the appellant entered into a written agreement with two other persons for the sale of the said land then registered in his name (photostat copy of title – page 19) for a sum of $1.35 million on terms and conditions set out in the agreement. At time of the sale of the land the Government of the State of Pahang had indicated to appellant its approval "in principle" of the appellant's application for sub-division into 17 shoplots and 19 residential lots. The sale agreement also provided that the sale was subject to the said approval being subsisting and not withdrawn or rescinded. The other provisions of the sale agreement dealt with the manner of payment of the purchase price and provisions relating to computation of the balance of purchase price contingent upon approval for shoplots or residential units as the case may be and also provisions for specified instalments to be secured by guarantee. Shortly after the sale a Deed of Assignment dated April 11, 1978 was executed whereby with the consent of the appellant the purchasers assigned their interests in the sale agreement to a company, Gambut Development Sdn. Bhd. (respondent now). It is to be noted however that the Deed of Assignment also carried a provision relating to what purports to be appellant's right to lodge a private caveat.

There is a civil suit pending (C.S. 224/81) in which the appellant alleges certain breaches of the sale agreement and asks for "rescission" of the contract and "retransfer" of the land and damages. The learned Judge in his judgment in this application dealt at length with some of the provisions of the sale agreement and the Deed of Assignment and came to certain conclusions. Stated briefly the conclusions of the learned Judge were as follows. It would seem clear to him that the only interest the appellant had in the land was the payment of the balance of the purchase price and that in the Judge's opinion did not constitute a caveatable interest. The learned Judge however found that there was by virtue of Clause 4(a) of the Deed of Assignment 3 contractual right of the appellant to enter a caveat and was of the opinion however that Gambut Development Sdn. Bhd. was not estopped from seeking the removal of the caveat. After going through some allegations of breaches in the agreement the learned Judge also found that Gambut Development Sdn. Bhd. had pursued all efforts to obtain the approval of the Government and the appellant too had done all he could but the ultimate result was that the State Government's approval was given for residential lots only. In the event the learned Judge's computation of the balance of the purchase price showed that there was in fact *no balance due* to the appellant and therefore the appellant had no further right to deny the respondent's demand that the caveat be removed. However the learned Judge apparently had second thoughts about the propriety of his findings on some of the issues at this stage and declared at the end of his written judgment that this pronouncements other than those pertaining to the caveat (obviously having regard to the pending suit) should be regarded as "obiter".

After the execution of the sale agreement the land was transferred and registered in the name of the respondent company on June 28, 1978. In the application of the appellant (in Form 19B) when lodging the caveat the ground given to the Registrar was only as follows –

"I am entering this caveat to protect my interest in the said land agreed pursuant to Clause 4(a) of the Deed of Assignment dated 11th day of April 1978."

In the statutory declaration accompanying the application to lodge the caveat the appellant stated as follows:–

"(1) I am a landed proprietor residing in Kuantan.

(2) By a Deed of Assignment dated April 11, 1978 I sold the said land to Gambut Development Sdn. Bhd. Pursuant to Clause 4(a) of the said Deed of Assignment I am entering a private caveat as agreed to protect my interest in the said land *as the full purchase price remains unpaid.*

(3) I am entering the caveat to protect my interest in the said land as agreed."

(emphasis supplied)

The nature of the onus which lies upon a caveator in an application by the caveatee under section 327 of the National Land Code is settled in *Eng Mee Yong & Ors.* v. *V. Letchumanan.*[1] If an applicant is the registered proprietor of the land he need only show that he is the registered proprietor. His registered title is *prima facie* evidence of his unfettered right to deal with the land as he pleases. It is then for the caveator to satisfy the court that there are sufficient grounds in fact and in law for the caveat to be extended. The caveator must satify the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and having done so he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the main action.

This approach to an application under section 327(1) of the National Land Code makes an analogy between the effect of the caveat and that of an interlocutory injunction in an action for specific performance of contractual sale of land. The court's power to grant an interlocutory injunction in such an action is discretionary. Similarly under section 327 of the National Land Code the court's power is discretionary.

To put it more simply, the caveator in this case must first satisfy the court that he has a "caveatable interest" in the land. Only if he has such an interest can he qualify to lodge a caveat under section 323 of the National Land Code. In the application to have the caveat removed the onus is cast upon the caveator to satisfy the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience the caveat should be extended until the disposal of the main action.

The main issues brought out in this case are many and can be seen in the affidavit of the appellant dated August 12, 1981 (pg. 59-63). Most of these issues belong more appropriately to the main suit. For convenience and brevity some of the main issues are summarised below:

(1) whether the respondent company has not submitted the new layout plan in their own name and as such there has been no "ultimate" rejection of the application for subdivision of shoplots;

(2) whether the respondent company can demand for the refund under Clause 3(a) of the agreement;

(3) whether there is over payment to appellant as claimed by the respondent;

(4) whether there were breaches of the agreement of sale including provisions relating to the charging of the land;

(5) whether there were "odd lots" not included in the sale agreement and these odd lots were held in trust by the respondent company.

For simplicity it is best to confine ourselves only to the issues raised in this appeal. There are two basic questions involved:—

(1) Can the appellant by virtue of Clause 4(a) of the Deed of Assignment claim to have any interest in the land capable of protection by caveat; and

(2) Is there any reasonable basis for the appellant's claim of a trust in respect of the odd lots which he claims to be not part of the land disposed of by the agreement of sale?

As can be seen in his own statement when lodging the caveat the sole basis of his claim of right to lodge the caveat was Clause 4(a) of the Deed of Assignment. Clause 4(a) reads as follows:—

"The Parties hereto are aware that the Second Party will charge the whole of the said land to Messrs. Hong Leong Finance Bhd. of Bangunan Hong Leong, 117 Jalan Bandar Kuala Lumpur for the sum of $1,000,000/- (Dollars One Million only) upon its transfer to the Second Party by the Vendor and the Parties hereto have agreed that the Vendor hereby waives the MPI Guarantee declared in clause 8 of the said Agreement and shall in lieu thereof:

(a) Lodge a Private Caveat against the said land being CT 4876 Lot 3 Sec. 20 Town of Kuantan to protect his interest."

It is clear in our view that the "interest" referred to in Clause 4(a) is the unpaid balance of the purchase price. Based on the affidavits and Clause 2(a) of the sale agreement relating to refundment there would seem to be a dispute as to whether upon computation according to the terms of the main agreement there was any balance of the purchase price at all. The appellant said there was but the company said there was not and according to the respondent money was in fact due from the appellant according to the computation.

The expression "interest" in the National Land Code was examined by the Privy Council in *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.*[2] An unsecured civil debt is a mere personal claim and did not come within the meaning of "interest" in section 320(1) of the National Land Code. Section 320 deals with circumstances in which the Registrar's caveat may be entered. The interest referred to in section 323(1) of the Code is interest as envisaged in the Code. Lord Diplock in *Temenggong Securities Ltd.* said at page 47 –

"The expression "interest" is used in many sections throughout the Code apart from section 320 and in none of them to which their Lordships' attention has been drawn can it be plausibly suggested that it bears any wider meaning than an interest in land of a kind which is recognised by the Code as being either registrable or otherwise entitled to protection."

Thus it is plain that the appellant claimed to have the right to lodge the caveat but based on Clause 4(a) of the Deed of Assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of section 323 of the National Land Code. Interests which are protectable by caveat are only interests recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title or interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words "any right to such title or interest" may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land. See also David Wong: Land Tenure in the Malay States – pg. 416-435.

At the heart of this argument lies the very essence of the Torrens system. The indefeasibility of title means that the title can only be challenged under section 340(2) of the National Land Code; and only an interest in land recognised under section 323 of the National Land Code can support a caveat.

In one of the affidavits filed the respondent company brought out the question of the appellant's agreement to withdraw the caveat in consideration of certain advanced payments vide notice of withdrawal of caveat dated January 22, 1979. On January 24, 1979 the notice of withdrawal of caveat was signed by the appellant. The learned Judge considered this but held that since the respondent company stopped payment of the cheque for $40,000/- there was failure of the agreed consideration and held that the appellant's contractual right to lodge the caveat continued to exist. One thing which we cannot fail to infer here is this, that the agreement to withdraw the caveat upon payment of $60,000/- was strong evidence indeed to indicate that the real reason for lodging the caveat was to secure the payment of the unpaid balance of the purchase price and not for the protection of any other interest as subsequently alleged by the appellant.

Now we come to the question of the alleged trust. It would appear that apart from the alleged unpaid balance of the purchase price the appellant also relied on an alleged trust created over the "odd lots" referred to in the affidavits and testimonials of the appellant and his lawyer, Mr. Mahindar Singh. References to these "odd" and "unsold" lots do not however appear anywhere in the main agreement nor in the Deed of Assignment. The appellant attempted to establish this by extraneous evidence. But as the learned Judge pointed out the onus of proving the existence of the trust was on the appellant and he said that even if the evidence to establish the alleged additional terms and conditions were admissible he was far from being satisfied that the appellant had discharged the onus. The learned Judge in his judgment dealt at length (with which we agree) with this claim as follows:–

"It was only in his second affidavit that Datuk Wong brought up the question of the odd lots and referred to the letter written by Hong Leong Finance Sdn. Bhd. – (Exhibit WKT 10) which does nothing for Datuk Wong's contention. More to the point would have been the letter of October 31, 1978 written by M/s Mahindar & Co. to Gambut stating that only 36 lots were sold and not the whole land. Tan Soo Hai in Court has denied any such understanding.

The contention that the odd lots were not sold and that Gambut holds them in trust for Datuk Wong is inconsistent with the terms of the sale and purchase agreement, with what is stated in the application for entry of caveat and in the supporting statutory declaration. It is also inconsistent with what is stated on the face of the document of title."

Thus the learned Judge found that on the balance of probability the whole of the land was sold absolutely and there were no odd lots unsold. Looking at the sale agreement we found no reason to disagree with the finding of the learned Judge on this point. We also feel that it is not easy to believe that an experienced lawyer like Mr. Mahindar Singh would have unwittingly or otherwise omitted very important provisions from the written agreement.

It is our view therefore that the appellant had no interest in the land capable of protection by caveat by virtue of Clause 4(a) of the Deed of Assignment. Neither has the appellant satisfied the court on the allegation of trust. Therefore the appellant had no right to lodge the caveat in the first place and much less any right to have the caveat extended.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Balendran, Chong & Bodi; Chooi & Co.*

DATUK ONG KIAN SENG & ORS. v. YEONG KOK CHUN & ORS.

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) February 20 & April 30, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 198 of 1983]

Practice and Procedure – Orders for the detention and preservation of documents – Discretion of judge – Companies Act 1965, s. 157 – R.H.C. 1980, O.29 r.2(1).

In this case there was a dispute over the shareholdings and the directorship of two companies. The learned trial judge made an order granting the application to deposit with the Senior Assistant Registrar of the High Court all files, minutes and other documents together with the common seals of the two companies until the final disposal of the suit with liberty to apply. The appellants appealed against the order and it was argued (a) that the order negates the effect of the order of the High Court which allowed the appellants to carry on as the companies' lawful directors and (b) that the order was contrary to section 157 of the Companies Act, 1965 which imposes a statutory duty on the directors to have in their custody the documents and the common seals of the companies.

Held: (1) Order 29 rule 2(1) of the Rules of the High Court, 1980, confers power on the Judge to make the order as she did and it was not wrong in law for the judge to have exercised her discretion under the circumstances;

(2) section 157 of the Companies' Act does not override or exclude the power of the Court in appropriate cases to make an order (as done in this case) to protect the integrity of documents which will be relevant for the proper determination of the dispute;

(3) the order of the learned trial judge should not have included the depositing of the common seals of the company so as to affect the day-to-day running of the affairs of the company. Subject to this variation in the order of the trial judge, the appeal is dismissed.

Case referred to:

(1) *Re Saxton deceased* [1962] 1 W.L.R. 859.

FEDERAL COURT.

Dominic Puthucheary for the appellants

Sri Ram for the 1st and 2nd respondents.

Raja Abdul Aziz Addruse (*Philip Choong* with him) for the 3rd respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The appeal is against the order granting the application to deposit with the Senior Assistant Registrar of the High Court all files, minutes and other documents together with the common seals of the fourth and fifth appellant companies until the disposal of the suit with liberty to the parties involved to apply for orders from time to time. When the appeal came up for hearing before this court Mr. Dominic Puthucheary, counsel for the appellants elected to proceed only with ground 1 and ground 8 of the memorandum of appeal.

In ground 1 the appellants claimed that the order negates the effect of the order of the High Court which allowed the appellants to carry on as the companies' lawful directors. In ground 8 the appellants claimed that the order of the learned Judge was contrary to section 157 of the Companies Act, 1965 which imposes a statutory duty on the directors to have in their custody the documents and the common seals of the companies.

A brief summary of the background facts are necessary. The first and second respondents are the son and daughter-in-law respectively of the first appellant. The disputes between them and the others named are firstly on the shareholdings and directorships (of first respondent and of first and second appellants) in the fourth and fifth appellant companies (Civil Suit P839 of 1982) and secondly on the validity of a written agreement between the